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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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OMAR AYALA,

Petitioner,

v.

BRIAN E. WILLIAMS, SR., *et al.*,

Respondents.

Case No. 2:17-cv-02093-RFB-VCF

ORDER

Introduction

This action is a petition for writ of habeas corpus by Nevada prisoner Omar Ayala. The respondents have filed a motion to dismiss Ground 7 of Ayala's second amended habeas petition on the ground that the claim is barred by the statute of limitations and unexhausted in state court. The Court will grant the motion to dismiss, and will dismiss Ground 7 as barred by the statute of limitations. The Court will set a schedule for the respondents to file an answer responding to Ayala's remaining claims.

Background

In its order on Ayala's direct appeal, the Nevada Supreme Court described the factual background of this case as follows:

Appellant Omar Ayala and his codefendants Angel Perez and Francisco Cruz attended an illegal street race and attempted to rob a car belonging to another group of men, then started shooting at them, killing one person. Ayala and his codefendants were apprehended shortly after

1 the incident. Ayala admitted to the police that he brought a handgun to the
2 race, that he and his codefendants planned to rob the owner of another
3 vehicle, that he fired his gun while outside of his vehicle, that he may have
4 been responsible for shooting the victim, and that he fired his gun out of the
5 window of the car as he and his group fled the scene.

6 Order of Affirmance, Exhibit 122, p. 1 (ECF No. 16-2, p. 2). After a jury trial in Nevada's
7 Eighth Judicial District Court (Clark County), Ayala was convicted of conspiracy to commit
8 robbery, attempted robbery with the use of a deadly weapon, second-degree murder with
9 the use of a deadly weapon, attempted murder with the use of a deadly weapon, assault
10 with a deadly weapon, and discharging a firearm out of a motor vehicle. See *id.*; see also
11 Judgment of Conviction, Exhibit 105 (ECF No. 15-10).

12 The Nevada Supreme Court affirmed the judgment of conviction on June 20, 2012.
13 See Order of Affirmance, Exhibit 122 (ECF No. 16-2).

14 Ayala filed a post-conviction petition for writ of habeas corpus in the state district
15 court on June 6, 2013. See Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit
16 126 (ECF No. 16-6). The state district court held an evidentiary hearing (see Transcript
17 of Evidentiary Hearing, Exhibit 135 (ECF No. 17-7)), and then denied Ayala's petition on
18 January 27, 2016. See Order Denying Petition, Exhibit 136 (ECF No. 17-8). Ayala
19 appealed, and the Nevada Supreme Court affirmed on May 9, 2017. See Order of
20 Affirmance, Exhibit 150 (ECF No. 18-3). The Nevada Supreme Court's remittitur was
21 issued on June 5, 2017. See Remittitur, Exhibit 152 (ECF No. 18-5).

22 Ayala submitted his original *pro se* federal habeas corpus petition for filing,
23 initiating this action, on July 31, 2017 (ECF No. 1-1).

24 Counsel was appointed for Ayala, and, with counsel, he filed a first amended
25 habeas petition on September 15, 2017 (ECF No. 8), and a second amended habeas
26 petition on January 23, 2018 (ECF No. 23). Ayala's second amended petition includes
27 the following claims:

28 Ground 1: Ayala's federal constitutional rights were violated as a result of
"the state district court's failure to dismiss the tainted jury pool." Second
Amended Petition (ECF No. 23), pp. 7-11.

1 Ground 2: Ayala's federal constitutional rights were violated because of
2 "the state district court's denial of Ayala's *Batson* challenge to the State's
striking of two African Americans from the jury pool." *Id.* at 11-12.

3 Ground 3: Ayala's federal constitutional rights were violated because of
4 "the state district court's denial of the motion to sever the trial of the
defendants." *Id.* at 13-14.

5 Ground 4: Ayala's federal constitutional rights were violated because of
prosecutorial misconduct. *Id.* at 14-16.

6 Ground 5: Ayala's federal constitutional rights were violated because "the
7 jury was not properly instructed on the elements of second degree felony
murder." *Id.* at 17-20.

8 Ground 6: Ayala's federal constitutional rights were violated as a result of
9 ineffective assistance of counsel, because his trial counsel failed "to file a
motion to suppress [his] statements to the police." *Id.* at 21-23.

10 Ground 7: Ayala's federal constitutional rights were violated as a result of
11 ineffective assistance of counsel, because his trial counsel failed "to consult
and hire an expert to challenge the toolmark identification evidence." *Id.* at
12 24-25.

13 Ground 8: Ayala's federal constitutional rights were violated because his
trial counsel was ineffective for "conceding Ayala's guilt." *Id.* at 25-27.

14 Ground 9: Ayala's federal constitutional rights were violated because his
15 trial counsel was ineffective "for failing to raise a claim of self defense." *Id.*
at 27-28.

16 Ground 10: Ayala's federal constitutional rights were violated because his
17 "trial counsel was ineffective for failing to file a motion to sever his case from
that of his co-defendants." *Id.* at 28-30.

18 Ground 11: Ayala's federal constitutional rights were violated because his
19 "trial counsel was ineffective for failing to investigate key defense witness
Angela Soloranzo." *Id.* at 30-31.

20 Ground 12: Ayala's federal constitutional rights were violated because his
21 "trial counsel was ineffective for failing to introduce shell casings later found
at the crime scene." *Id.* at 31.

22 Ground 13: Ayala's federal constitutional rights were violated because "trial
23 counsel was ineffective for failing to object to testimony concerning
uncharged bad acts." *Id.* at 32-33.

24 Ground 14: Ayala's federal constitutional rights were violated because
25 "appellate counsel was ineffective for failing to properly brief an issue of
prosecutorial misconduct arising from the State's improper use of the term
26 "gangsta." *Id.* at 34-35.

27 Ground 15: Ayala's federal constitutional rights were violated because
28 "appellate counsel was ineffective for failing to raise the claim that Ayala's
sentence was cruel and unusual punishment." *Id.* at 36-37.

1 Ground 16: Ayala's federal constitutional rights were violated because
2 "appellate counsel was ineffective for failing to raise the claim that the trial
court violated Ayala's right to due process when it improperly canvassed
Ayala about trial counsel's concession of guilt." *Id.* at 37-38.

3 Ground 17: "The cumulative error of trial and appellate counsel's
4 ineffectiveness" violated Ayala's federal constitutional rights. *Id.* at 38-39.

5 On March 26, 2018, Respondents filed a motion to dismiss (ECF No. 25), arguing
6 that Ground 7 of Ayala's second amended petition is barred by the statute of limitations
7 and unexhausted in state court. On May 23, 2018, Ayala filed an opposition to the motion
8 to dismiss (ECF No. 27), and on May 25, 2018, Respondents filed a reply (ECF No. 28).

9 Discussion

10 The Antiterrorism and Effective Death Penalty Act (AEDPA), enacted in 1996,
11 established a one-year statute of limitations for federal habeas petitions filed by prisoners
12 challenging state convictions or sentences; the statute provides:

13 (1) A 1-year period of limitation shall apply to an application for a writ
14 of habeas corpus by a person in custody pursuant to the judgment of a State
court. The limitation period shall run from the latest of --

15 (A) the date on which the judgment became final by
16 the conclusion of direct review or the expiration of the time for
seeking such review;

17 (B) the date on which the impediment to filing an
18 application created by State action in violation of the
Constitution or laws of the United States is removed, if the
19 applicant was prevented from filing by such State action;

20 (C) the date on which the constitutional right asserted
was initially recognized by the Supreme Court, if the right has
21 been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

22 (D) the date on which the factual predicate of the claim
23 or claims presented could have been discovered through the
exercise of due diligence.

24 28 U.S.C. 2244(d)(1).

25 The AEDPA statute of limitations is tolled during the time that a properly filed
26 application for state post-conviction or other collateral review is pending in state court.

27 See 28 U.S.C. § 2244(d)(2).

1 A habeas petitioner is entitled to equitable tolling of the AEDPA statute of
2 limitations if the petitioner shows “(1) that he has been pursuing his rights diligently, and
3 (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.”
4 *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408,
5 418 (2005)); *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009).

6 Ayala’s conviction became final, for purposes of the statute of limitations analysis,
7 on September 18, 2012, which was ninety days after the Nevada Supreme Court ruled
8 on his direct appeal. See Order of Affirmance, Exhibit 122 (ECF No. 16-2).

9 Ayala initiated his state habeas action 261 days later, on June 6, 2013, tolling the
10 statute of limitations under 28 U.S.C. § 2244(d)(2). See Petition for Writ of Habeas Corpus
11 (Post-Conviction), Exhibit 126 (ECF No. 16-6). Ayala’s state habeas action concluded,
12 and the tolling ended, on June 5, 2017, when the Nevada Supreme Court issued its
13 remittitur after affirming the denial of his state habeas petition. See Remittitur, Exhibit 152
14 (ECF No. 18-5).

15 The remaining 104 days of the limitations period ran out on September 17, 2017.
16 Ayala’s original petition in this case (ECF No. 1-1), submitted for filing on July 31, 2017,
17 and his first amended petition (ECF No. 8), filed September 15, 2017, were filed before
18 that date, and were timely filed. Ayala’s second amended petition (ECF No. 23), filed
19 January 23, 2018, was filed after the expiration of the limitations period.

20 Therefore, the question whether the claims in Ayala’s second amended petition
21 are barred by the statute of limitations turns on the determination whether those claims
22 relate back to his original petition or first amended petition.

23 In *Mayle v. Felix*, 545 U.S. 644 (2005), the Supreme Court held that “[s]o long as
24 the original and amended petitions state claims that are tied to a common core of
25 operative facts, relation back will be in order,” but “[a]n amended habeas petition ... does
26 not relate back (and thereby escape AEDPA’s one-year time limit) when it asserts a new
27 ground for relief supported by facts that differ in both time and type from those the original
28 pleading set forth.” *Mayle*, 545 U.S. at 650, 664.

1 Respondents' contend that Ground 7 in Ayala's second amended petition does not
2 relate back to any claim in Ayala's original or first amended petition. See Motion to
3 Dismiss (ECF No. 25), p. 12. In Ground 7, Ayala claims that his federal constitutional
4 rights were violated as a result of ineffective assistance of counsel, because his trial
5 counsel failed "to consult and hire an expert to challenge the toolmark identification
6 evidence." See Second Amended Petition (ECF No. 23), pp. 24-25.

7 In response, Ayala argues that Ground 7 relates back to Grounds 6C, 6D and 6F
8 of his first amended petition. See Opposition to Motion to Dismiss (ECF No. 27), pp. 5-6.
9 Ground 6C of Ayala's first amended petition was a claim that his trial counsel was
10 ineffective for not asserting that he acted in self-defense. See First Amended Petition
11 (ECF No. 8), pp. 41-42. Ground 6D of Ayala's first amended petition was a claim that his
12 trial counsel was ineffective for not moving to sever his case from that of his co-
13 defendants. See *id.* at 42-44. Ground 6F of Ayala's first amended petition was a claim
14 that his trial counsel was ineffective for failing to introduce into evidence shell casings
15 found at the crime scene, because "[t]he presence of shell casings supports what could
16 have been a self-defense theory, and certainly for example meets the 'some' evidence
17 standard to have received a jury instruction concerning self-defense." See *Id.* at 45-46.
18 There is nothing alleged in any of those claims regarding the State's toolmark evidence.
19 There is no mention in any of those claims of Ayala's counsel's failure to hire a toolmark
20 expert. And, even more generally, there is no allegation in those claims that Ayala's trial
21 counsel should have challenged the notion that Ayala, rather than either of his co-
22 defendants, fired the fatal shot; the gist of Grounds 6C, 6D and 6F of Ayala's first
23 amended petition was that Ayala's trial counsel should have pursued a self-defense
24 theory. Ground 7 of Ayala's second amended petition does not share a common core of
25 operative fact with Grounds 6C, 6D and 6F of his first amended petition, and, therefore,
26 does not relate back to those claims. As Ground 7 does not relate back to Ayala's original
27 or first amended petition, it is barred by the statute of limitations, and it will be dismissed
28 on that ground.

1 The Court need not reach, and declines to reach, the question whether Ground 7
2 is unexhausted in state court or procedurally defaulted.

3 **IT IS THEREFORE HEREBY ORDERED** that Respondents' Motion to Partially
4 Dismiss Second Amended Petition for Writ of Habeas Corpus (ECF No. 25) is **GRANTED**.
5 Ground 7 of Petitioner's second amended habeas petition (ECF No. 23) is **DISMISSED**.

6 **IT IS FURTHER ORDERED** that Respondents shall, within 90 days from the date
7 of this order, file an answer, responding to the remaining claims in Petitioner's second
8 amended habeas petition. In all other respects, the schedule for further proceedings set
9 forth in the order entered October 25, 2017 (ECF No. 21) remains in effect.

10 **IT IS FURTHER ORDERED** that, pursuant to Federal Rule of Civil Procedure
11 25(d), the Clerk of the Court is directed to substitute Brian E. Williams, Sr., for Jo Gentry,
12 on the docket for this case, as the respondent warden.

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14 DATED THIS 15th day of Janaury, 2019.



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16 RICHARD F. BOULWARE, II,
17 UNITED STATES DISTRICT JUDGE
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